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No. 85-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

O. L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

GREGORY ALLEN PETTY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether, if a habeas petitioner's pleadings are insufficient, it is appropriate for the district court to make a decision on the merits.

II. Whether it is within the discretion of a circuit court to remand for amendment and an evidentiary hearing when a habeas petitioner clarifies his allegations on appeal.

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COMES NOW, Gregory Allen Petty, Respondent[1] herein, by and through his attorney, and files this Brief.

STATEMENT OF THE CASE

On May 29, 1979, Gregory Allen Petty was arrested and placed in jail in Lubbock County, Texas, where he was held until sentenced to the Texas Department of Corrections. On June 7, 1979, Gregory Allen Petty was indicted in the 99th Judicial District Court of Lubbock County for the offense of aggravated robbery. (T 3).[2] One month later, on July 10, 1979, Wanda Wray was appointed as Petty's counsel. (T 7). Two months later, on September 6, 1979, Petty was tried before a jury, which returned a verdict of guilty. (SF 244).

The next day, on September 7, 1979, Petty appeared before the same jury for sentencing. (T 247). The jury assessed Petty's punishment as confinement in the Texas Department of Corrections for a period of 50 years. (SF 281). On September 20, 1979, Petty was sentenced by the court to imprisonment for an indefinite term of not less than five years, nor more than 50 years. (T 26). Petty has been in the State's custody ever since.

On March 7, 1984, after an unsuccessful direct appeal and a state habeas proceeding, Petty filed his federal habeas petition, identifying six grounds for relief. (A 4).[3] Among the six, he alleged that he was denied effective

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[1] To parallel Petitioner's brief, Petitioner, O.L. McCotter, Director, Texas Department of Corrections, will be referred to herein as the state. Respondent, Gregory Allen Petty, will be referred to as Petty.

[2] For convenience, the following abbreviations are used herein in reference to the material within the record. "T" refers to the state Transcript. Page citations are used as employed in the index thereto. "SF" refers to the Statement of Facts from the State trial.

[3] To parallel Petitioner's brief, "A" refers to the Joint Appendix. Those portions of the Joint Appendix which are attached to the Petition for Writ of Certiorari are designated by the following letter, e.g., "F."

assistance of counsel. (A 11). This was the only claim considered by the Fifth Circuit on appeal and is the only claim now before this Court.

In his habeas petition, Petty alleged that Wanda Wray conferred with him only once prior to trial and only then to urge him to accept a plea bargain. (A 11). He alleged that she failed to interview prospective defense witnesses, that she failed to conduct a pretrial investigation, and that she was totally unprepared for trial. (A 11). Finally, he alleged, albeit imprecisely, that she failed to explain the nature of the charges against him. (A 12).[4]

On the same day Petty filed his petition, a magistrate acting for the district court ordered the state to file its answer to Petty's petition. (A 1). On April 11, 1984, the state filed its Answer and Supporting Brief. (A 1, 17). In its answer, the state pointed out, regarding Petty's ineffective assistance claim, that Petty "[did] not allege what pretrial investigation should have been conducted," (A 18) that he "[did] not allege what witnesses should have been interviewed" (A 18) and that he "[did] not demonstrate how additional conferences would have benefited counsel or any defense of [Petty]." (A 18). The state went on to pray for dismissal of all six of Petty's claims. (A 23).

On April 24, 1984, the magistrate filed his Report and Recommendation. (A 1 and AC-1). Regarding Petty's ineffective assistance claim, the magistrate noted that Petty "has the burden to demonstrate . . . and prove an identifiable lapse on the part of counsel as well as some adverse impact upon the fairness of his trial." (AC-3). The magistrate then noted that "in this case [Petty] has not met that burden." (AC-3). Nonetheless, the magistrate went on to

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[4] Petty's actual allegation was that "counsel neglected to explain the full legabity (sic) of the offense for which I was charged and indicted." (A 12).

examine the record and determine that "the representation afforded by appointed counsel was well within the standard of *MacKenna* v. *Ellis*, 280 F.2d 592, 599 (5th Cir. 1960)." (AC-4). He also recommended that all of Petty's claims be denied. (AC-8).

On May 14, 1984, the district court adopted the magistrate's findings and "denied and dismissed" Petty's petition. (A 1, AD-1 and AE-1).

SUMMARY OF ARGUMENT

The Fifth Circuit correctly observed that in his extensive *pro se* brief, Petty attempted, for the first time, to specify how his counsel's failure to conduct a pretrial investigation prejudiced his defense. (AF-3). Regarding Petty's two "prejudice" claims made on appeal, the Fifth Circuit reviewed and rejected Petty's claim that by conducting an investigation, his counsel could have better handled the identification issue. (AF-3, 4). However, the Fifth Circuit recognized that there could be some merit to Petty's claim that a pretrial investigation might have revealed a valid insanity defense. (AF-5). The Fifth Circuit reasoned that had Petty so pleaded at the district court level, he would have been entitled to an evidentiary hearing. (AF-4). Therefore, the Fifth Circuit remanded Petty's habeas action to the district court "with instructions to permit Petty to amend his petition, to permit the state to amend its answer and then to conduct such further proceedings as may be appropriate and consistent with this opinion." (AF-5).

The Fifth Circuit's disposition of this case was entirely appropriate under the circumstances. Petty filed his habeas action on the form attached to the Rules Governing Section 2254 Cases in the United States District Court. The form was adopted by the then-existing local rules of the district court and was supplied to him by the

district court. Petty pleaded in accorance with the Form's instruction to "tell your story *briefly* without citing cases or law." (A 11).

Though both the state in its answer and the magistrate in his Report and Recommendation determined that Petty's pleadings were insufficient, he was given no specific instruction to amend at any stage of the proceeding. Procedures for instructions to habeas petitioners are carefully provided in the Section 2254 Rules, as are procedures by which a district court may order the expansion of an incomplete factual record. What is more, the district court has a duty to develop a factual record sufficient to make an adequate inquiry of the petitioner's claims. *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969).

The Fifth Circuit's decision to remand, with an opportunity for Petty to amend, is supported by the general rule that dismissals based on defects in pleading should not be made on the merits. The decision is further supported by the general rule that *pro se* habeas petitions are held to less stringent pleading standards than those required of attorneys and supported by the fact that this Court's decisions regarding the pleading requirements in ineffective assistance cases had not been decided at the time Petty filed his petition.

Finally, the Fifth Circuit's decision should be affirmed for the simple reason that it corrects the district court's failure to do all that could or should have been done in accordance with its duty to provide "the necessary facilities and procedures for an adequate inquiry" into his case. *Id.* at 300. As this Court recognized in *Blackledge* v. *Allison*, 431 U.S. 63, 83 (1977), "it may turn out upon remand that a full evidentiary hearing is not required." But Petty is "entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts." *Id.* at 83, 84, *quoting Harris* v. *Nelson*, 394 U.S. at 298.

ARGUMENT

I. THE DISTRICT COURT'S "DISMISSAL AND DENIAL" OF PETTY'S PETITION WAS INAPPROPRIATE.

There were six allegations before the district court when it considered Petty's habeas action.[5] Denial of five of the six on the merits was appropriate. With all but Petty's ineffective assistance of counsel claim, the district court had no trouble *reaching* the merits. Sufficient facts were pleaded by Petty to allow full consideration of his other claims. (A 12-14). Other facts were readily ascertainable in the record as needed.

The same was not true with Petty's ineffective assistance claim. Both the state in its answer and the magistrate in his Report and Recommendation (adopted by the district court) analyzed Petty's claim beginning with the conclusion that Petty's pleading was insufficient. (AC-3 and A 18). Both the state and the magistrate sought to analyze the record in relation to Petty's claim, but the record is of only limited benefit when considering claims of inadequacy of *pretrial* preparation and lack of advice given *prior* to trial, especially when one begins with the conclusion that the factual pleadings are insufficient.

Petty pleaded that "counsel only conferred with me one time before trial . . . to receive a brief knowledge of the case, and too (sic) deliver the . . . plea bargain deal." (A 11). He pleaded that "never was there a discussion of a

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[5] In addition to ineffective assistance of counsel, Petty pleaded that: (1) the indictment was fundamentally defective; (2) the state did not prove that he used or exhibited a deadly weapon during the robbery; (3) the state did not prove that the knife was a deadly weapon; (4) the court did not admonish him against self-incrimination when he was asked to open his mouth (to show his teeth for identification purposes) during trial; and (5) the court erroneously admitted evidence of an "impermissibly suggestive" pretrial identification. (A 12-14).

possible defense" (A 12) and that counsel failed to conduct a pretrial investigation. (A 11). The trial transcript and other trial court records do not reveal the extent of trial counsel's pretrial preparation or pretrial advice.

Though deference is due to appointed counsel's strategic judgments made in pretrial preparation, it is well established that "counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2066 (1984). Petty alleged that his counsel was derilect in this duty. (A 11).

Petty made his allegations without elaboration. (A 11). Both the state in its answer and the magistrate in his Report and Recommendation stressed the deficiencies in Petty's pleading. (A 18 and AC-3). Then, both went on to examine the record in relation to the ineffective assistance claim as well as Petty's five other claims which were properly pleaded by Petty. (A 19 and AC-3). However, the only observations made about the record, as it related to Petty's ineffective assistance claim, were that: (1) counsel took part in voir dire of the jury, (2) counsel cross-examined witnesses, (3) counsel made a closing argument, (4) counsel was appointed two months before trial, (5) counsel was assisted by other counsel, and (6) counsel made objections. (A 19 and AC-3).

The record does not identify any particular investigation or any advice. Neither the state, nor the magistrate referred to any investigation or advice shown by the record, but both concluded, after review of the record, that Petty was not entitled to relief on any of his six claims. (A 19, 23 and AC-3, 8). The district court adopted the magistrate's findings and "dismissed and denied" Petty's petition in its entirety without a hearing. (AD-1 and AE-1).

The state contends that the district court's "dismissal and denial" was proper in relation to Petty's ineffective assistance claim and that, even as to this claim, the dismissal was properly made on the merits. Petty disputes both contentions.

A. District Courts Have A Duty To Develop Habeas Factual Records In Appropriate Cases.

The state argues at long length that Rule 2(c) is the cornerstone of a screening process, "the strict application of [which] assists the district courts in disposing of the mass of frivolous petitions so that they may more fully consider those few claims which seem to have some merit." (State's Brief at 12, 13). Petty recognized that some factual pleading was required of him. The form on which he filed his petition so instructed him. For that reason, in addition to pleading simply that he did not receive effective asistance of counsel, he alleged that his counsel failed to give him necessary advice or conduct a sufficient pretrial investigation.

From Petty's perspective these allegations are factually pleaded. Of course, the state, the magistrate and the district court concluded otherwise at the trial level. The Fifth Circuit recognized why the district court had so concluded, i.e., that "Petty failed to allege that he suffered any specific prejudice." (AF-2). In light of facts extensively set out by Petty in his *pro se* brief, the Fifth Circuit found that Petty's was an appropriate case for expansion of the factual record.

In its zeal, the state overstates the purpose of factual pleading. Nothing about habeas pleading requirements has ever been "strictly applied" by this Court or any court. *Haines* v. *Kerner*, 404 U.S. 519, 521 (1972), stands for the proposition that *pro se* petitions are held "to less stringent standards than formal pleadings drafted by lawyers."

The policy behind the requirement of factual pleading is more than simply to reduce the workload of district judges. Habeas petitioners "as the Congress and this Court have emphasized, . . . are entitled to careful consideration and plenary processing of the claims *including full opportunity for presentment of the relevant facts.* (Emphasis added.) *Harris* v. *Nelson*, 394 U.S. at 298. Factual pleading is only the first step of a system designed to develop a factual record sufficient to support "careful consideration" of habeas claims by the district courts. Other important procedures are needed so as not to allow a habeas proceeding "to founder in a 'procedural morass'" simply because "the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts in his petition." *Id.* at 291, *quoting Price* v. *Johnston*, 334 U.S. 266, 269 (1948).

While the burden of factual pleading must, by nature, originate with the habeas petitioner, the burden does not rest entirely upon the shoulders of the *pro se* habeas petitioner. A habeas petitioner must identify his constitutional complaint and, pursuant to *Strickland*, and *Hill* v. *Lockhart*, ___ U.S. ___, 106 S.Ct. 366 (1985), must show actual prejudice at the trial level by further factual allegation. On the other hand, in cases where the petitioner fails to follow the pleading requirements, but where there remains "reason to believe the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally," then it *"is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."* (Emphasis added). *Harris* v. *Nelson*, 394 U.S. at 300.

Procedures for the development of the factual record by the district court are well established. These procedures, discussed later in this brief, are carefully provided in the Rules Governing Section 2254 Proceeding in the United

States District Courts (the "Section 2254 Rules") promulgated by this Court and adopted by Congress in 1976.

Full development of a factual record, through the variety of pleading requirements and other procedures, is essential, because this Court has instructed that "[i]t is the typical, not the rare, case in which constitutional claims turn upon a resolution of contested factual issues." *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963). Without fully developing a factual record when necessary, by whatever means is available, the district court fails in its duty to provide the necessary facilities and procedures for an adequate inquiry. *Harris*, 394 U.S. at 300.

B. Several Options Were Available For The Development By The District Court Of The Factual Record.

Townsend v. *Sain* requires that district court hold an evidentiary hearing "where the facts are in dispute." *Townsend* v. *Sain*, 372 U.S. at 312. The Advisory Committee Note to Rule 8, 28 U.S.C. fol. 2254, makes it clear that in situations where the grant of an evidentiary hearing is not required, then it rests within the discretion of the district court whether to grant a hearing.

The Section 2254 Rules provide many, less time-consuming options for the development of the factual record by the district court. At the outset, return of the petition under Rule 2(e), 28 U.S.C. fol. 2254, with instructions as to its insufficiency is designed to prompt a more factually pleaded response. Similarly, summary dismissal under Rule 4, 28 U.S.C. fol. 2254, would serve to encourage better factual pleading. Another option is to order an answer, which requires the state to produce part or all of the transcript. Rule 5, 28 U.S.C. fol. 2254.

Even after the state has answered, district courts can fulfill their duty to provide for an adequate inquiry by expansion of the factual record under Rule 7, 28 U.S.C.

fol. 2254. The state may be correct in its assertion that discovery is rarely used in federal habeas actions (State Brief at 12), but this is certainly not because habeas petitioners are normally adept at pleading their cases. Petty's pleading insufficiencies are not an uncommon problem.

Pleading insufficiencies represent a recurrent problem, one that this Court has recently dealt with in *Strickland* and *Hill*. However, Petty's petition presents this typical pleading problem in a slightly different light. Petty Pleaded, "factually," that his counsel failed to investigate his case and to render appropriate advice and that for five other reasons he should be afforded relief. Petty's allegations may be characterized as either statements of fact or conclusory statements, based primarily upon the reader's, or writer's, perspective. If Petty's allegations are true, the "prejudice" from Petty's allgations is obvious. Appointed attorneys have a duty to conduct *some* pretrial investigation. *Strickland*, 104 S.Ct. at 2066.

The difficulty in characterizing Petty's ineffective assistance pleading as factual or conclusory is deepened since the allegations were made in a single petition with five other properly pleaded allegations. For that reason, Petty's pleading was probably not so obviously insufficient that it could reasonably be expected to be quickly returned by a clerk under Rule 2(e)[6] and yet the district court found Petty's allegations factually insufficient and denied his request for an evidentiary hearing. (AD-1 and AE-1). However, since the district court had a *duty to provide for an adequate inquiry*, Petty's case is one in

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[6] The Advisory Committee Note to Rule 2(e), 28 U.S.C. fol. 2254 interprets Rule 2(e) to authorize the clerk to return certain petitions before review by the judge. "Subdivision (e) allows the clerk to return an insufficient petition to the petitioner, and it must be returned if the clerk is so directed by a judge of the court."

which the district court should have either granted a discretionary evidentiary hearing or ordered expansion of the factual record. *See*, *Clark* v. *Blackburn*, 619 F.2d 431 (5th Cir. 1980).

Development of the factual record by discovery is limited in habeas actions *only* to the extent that either a party must obtain leave of court to proceed under Rule 6 or under Rule 7 "the judge must direct that the record be expanded . . . by the inclusion of additional materials relevant to the determination of the merits of the petition." The Advisory Committee Note to Rule 7 explains that "the purpose (of Rule 7) is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." The Rule 7 Advisory Committee Note goes on to clarify, quoting *Raines* v. *United States*, 423 F.2d 526, 529-530 (4th Cir. 1970), that:

> Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time-consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and in an appropriate case, even affidavits. (Citations omitted)

While the state may be correct that expansion of the record by discovery is not often seen in habeas cases, the procedures for discovery are in place and this Court has instructed district courts to expand the record "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is illegally confined." *Harris* v. *Nelson*, 394 U.S. at 300.

Petty's allegations, that his appointed counsel failed to investigate his case prior to trial and that she failed to give advice regarding the trial of his case, are serious allegations that cannot be fully investigated solely by review of the trial record. Therefore, in accordance with the district court's duty, the record should have been further developed by either granting of an evidentiary hearing, ordering expansion of the record or returning Petty's petition with instructions to elaborate.

C. Dismissals Due To Defects In Pleadings Are Not Normally Made On The Merits.

The state in its answer recognized that Petty's pleadings were insufficient. (A 18). The magistrate so reported to the district court in his Report and Recommendation. (AC-3). The district court so found by adoption of the magistrate's Report and Recommendation. (AD-1 and AE-1). On appeal, the Fifth Circuit recognized that "the district court dismissed [Petty's ineffective assistance] claim because Petty failed to allege that he suffered any specific prejudice as a result of his counsel's actions." (AF-2). The Fifth Circuit, therefore, remanded with instructions to the district court to allow Petty to amend his petition to plead "prejudice." (AF-2, 5).

The state takes the position that the district court's judgment was necessarily "made on the merits because the state answered and the district court reviewed the record." (State's Brief at 20). If this argument is correct, then in the future, as Petty sought to properly plead "prejudice" by his counsel's failure to investigate his insanity defense or because of any other failure of trial counsel, Petty would face defenses of res judicata and abuse of the writ under Rule 9(b), 28 U.S.C. fol. § 2254. (State's Brief at 22).

Such a result is not in keeping with the general rule that a dismissal based upon a defect in pleading, such as a *Hill-*

type defect, should not be made on the merits. As this Court wrote in *Costello* v. *United States*, 365 U.S. 265, 286 (1961):

> If the first suit was dismissed for defect of the pleading, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit.

Further, a dismissal with prejudice for failure to state a claim is inappropriate unless it appears "beyond doubt" that no set of facts can be proven to support the claim. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

As to Petty's five allegations, other than ineffective assistance, the district court's decision was properly made on the merits. In regards to Petty's ineffective assistance claim, however, by adoption of the magistrate's Report and Recommendation, the district court first found that Petty's pleading was insufficient then, according to the state, ruled upon the merits.

The state's argument under Fed. R. Civ. Pro. 41(b) is unavailing. The Advisory Committee Note to Rule 11, 28 U.S.C. fol. 2254 does recognize that habeas proceedings are normally characterized as civil in nature.[7] However, application of Fed. R. Civ. P. 41(b) in this case is not appropriate. The pleading rules in Section 2254 cases are vastly different than in ordinary civil litigation where notice pleading is sufficient. In addition, application of Rule 41(b) in this case would be especially harsh where

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[7] For that reason, Rule 11 provides that the Federal Rules of Civil Procedure "may be applied when appropriate to petitions filed under [the Section 2254 Rules]" and Fed. R. Civ. P. 81(a)(2) provides that the federal rules are applicable to habeas proceedings "to the extent that the practice in such proceedings is not set forth in statutes of the United States."

Petty was proceeding *pro se* and where he never received specific notice of his pleading insufficiency.

The 10-day objection period provided by the magistrate's report was, under the circumstances, inadequate and wholly uncalculated to draw Petty's attention to a particular problem. First, Petty's pleading had already passed initial examination under Rule 2(e) and Rule 4 without return or dismissal. Second, though the state and the magistrate noted the insufficiency, they purported to reach the merits in their pleadings. Third, and finally, Petty's petition and the magistrate's Report and Recommendation were complicated because of Petty's inclusion of five allegations other than ineffective assistance.

Though it would be improper to apply Rule 41(b) to Petty's case, other federal procedure rules illustrate further options available to the state and the district court in handling Petty's case. Instead of, or in the alternative to an answer, the state could properly have made a motion under Fed. R. Civ. P. 12(b) to dismiss Petty's ineffective assistance claim for failure to state a claim or under Fed. R. Civ. P. 12(e) for a more definite statement. Indeed, the district court, after examination of Petty's petition under Rule 4, could have ordered the state to file such a pleading as authorized by Rule 4.

By its decision the Fifth Circuit simply placed Petty into the position he would have occupied had Petty's ineffective assistance claim been properly separated from his other claims and treated under Rule 2(e) by notification, under Rule 4 by summary dismissal, or under Rule 7 by expansion of the record.

D. Petty's Pleading Defect Was In Part Due To His Use Of The Form Affixed To The Rules Governing Section 2554 Cases.

Petty filed his petition on March 7, 1984, on a form (the "Form") supplied to him by the district court, in accor-

dance with Rule 2(c), 28 U.S.C. fol. 2254. The Form instructs *pro se* habeas petitioners to "tell your story *briefly* without citing cases and law" and to "state *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground." (A 9-11). There was and is no mention in the Form that "prejudice" should be pleaded by *pro se* habeas petitioners. In fact, there was no suggestion that a *pro se* habeas petitioner must allege adverse impact or any additional fact in an ineffective assistance claim other than as needed to state any of the other nine often-raised grounds for relief listed on the Form. (A 10, 11).

The conflict between the instructions on the Form and the newly-developed *Strickland* and *Hill* pleading requirements played a part in the Fifth Circuit's decision. In its opinion the Fifth Circuit recommended that district courts modify the standard forms provided to *pro se* habeas petitioners to require them to specifically allege prejudice when pleading ineffectiveness of counsel. (AF-5).

The Fifth Circuit's recommendation is in keeping with the *Haines* v. *Kerner* rule that *pro se* petitions be held to less stringent standards, which is particularly applicable in this case where a *pro se* petitioner has pleaded in accordance with a form provided for his use by the district courts pursuant to federal rules. Even when using the Form, the advisory committee recognized that "the adequacy of a petition will continue to be affected largely by the petitioner's intelligence and the legal advice available to him." Rule 2, 28 U.S.C. fol. 2254, advisory committee note.

The best that can be reasonably expected of a *pro se* petitioner, regardless of his inteligence, is a pleading in accordance with the instructions given in the Form. With five out of six claims, Petty managed to plead sufficient

facts for the district court to properly reach the merits. The Fifth Circuit's decision to remand for amendment of Petty's ineffective assistance claim is proper as it avoids penalizing Petty for following the Form's instructions or for any lack of intelligence or lack of legal advice that led to the insufficient pleading of his claim.

E. Pleading Requirements Regarding Ineffective Assistance Claims Were Only Developing At The Time Of Petty's Petition.

Petty's petition was filed on March 7, 1984. The district court ruled on May 14, 1984, which coincidently was the same day this Court decided *Strickland*. The *Strickland* requirement that a petitioner must plead and prove "prejudice," not simply "adverse impact,"[8] was closely followed by *Hill* to specifically require "prejudice" to be pleaded prior to the grant of an evidentiary hearing.

These additional proof and pleading requirements, however, came after Petty's petition had been ruled upon by the district court. In addition, the Form used by Petty as his petition made no suggestion that Petty refer to case law to determine what he must plead, nor was there any instruction explaining the purpose for which factual pleading was reqired. As the Form is now drafted, there exists a conflict between its instructions to "state briefly the facts" and those of *Strickland* and *Hill* that a petitioner must specifically plead deficiencies of representation and prejudice caused as a result. *Hill*, 106 S.Ct. at 369. Because the *Strickland* and *Hill* pleading requirements came about in time after Petty's petition was filed and ruled upon, the Fifth Circuit's decision to remand

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[8] A habeas petitioner pleading ineffective assistance in the Fifth Circuit prior to *Strickland* and *Hill* was required to prove an identifiable lapse in counsel's representation and actual, adverse impact upon the trial. *Boyd* v. *Estelle*, 661 F.2d 388, 389-90 (5th Cir. 1981).

with an opportunity for Petty to amend his petition was appropriate.

F. Review Of The Record Reveals That Judgment Thereon Was Inappropriate.

The state asserts that the district court's dismissal was made on the merits, and amounted to summary judgment, even as to Petty's ineffective assistance claim. For reasons stated herein, Petty states that the dismissal should never have reached the merits. Further, as to Petty's ineffective assistance claim, however, summary judgment would be improper because the record before the district court presented fact questions as to Petty's allegations.

The magistrate's Report and Recommendation, made without an evidentiary hearing, focused only on the fact that trial counsel conducted a voir dire examination, cross-examined witnesses and made closing argument. (AC-3). The fact that trial counsel participated in these aspects of the trial is not dispositive of the serious allegations concerning pretrial preparation raised by Petty in this case. *See*, *Clark* v. *Blackburn*, 619 F.2d at 434. The magistrate did not in any way report upon the substance of the record in his Report and Recommendation.

A review of the record reveals at least two instances where trial counsel's failure to investigate or to give advice may have prejudiced Petty's case. Neither was mentioned in Petty's petition or *pro se* Fifth Circuit brief, but both are revealed by the record and both create fact questions as to Petty's claims which render summary judgment inappropriate. *Id.* at 434.

The two readily identifiable instances wherein trial counsel's representation may have fallen short of constitutional standards involve (1) pretrial investigation of the voluntariness of Petty's consent to a search of his motel

room after his arrest and (2) advice given to Petty regarding the decision to take the stand during the sentencing phase.

Reviewing the record reveals that trial counsel's only real strategy during the guilt/innocence phase of the trial was to contest identification. The prosecutor's principal closing argument on the issue of identification, however, concerned Petty's "confession" about the location of the fruits of the robbery. (SF 221, 225 and 242).

Petty's "confession" was established in the testimony of the arresting officers. After arrest, according to Officer Green's testimony, Petty was asked, "if he knew where the victim's purse was?", to which Petty allegedly responded, "Yes, it's in my room, room Number 12, Joy Motel." (SF 163). Whereupon, the arresting officer testified that he asked Petty to sign a consent to search form (SF 163), then went with Petty to recover the purse and its contents from the motel room. (SF 166).

An investigation of Petty's case should have involved whether Petty's alleged "confession" was truly voluntary. The consent to search form itself, signed by Petty and witnessed by the officers and the motel desk clerk, conflicts with the testimony of the arresting officers. The officers testified that after obtaining Petty's statement about the location of the purse, they completed the consent to search form in the presence of and witnessed by the motel desk clerk, and then, proceeded to search the room. (SF 163, 166). However, the consent to search form describes the purse and its contents in detail, though supposedly completed prior to the search. (SF 166, 298).

There is no evidence in the record that Petty's attorney ever investigated the voluntariness of the search. She did not call the desk clerk as a witness. She did not request a pretrial evidentiary hearing or file any pretrial motions to exclude the evidence. She did not object to the admission

of the consent to search form. (SF 166, 298). Nor did she object to the admission of the purse and its contents. (SF 93).

While investigation may reveal that the search of Petty's room was absolutely voluntary, *the record reveals no investigation by Petty's attorney.* Petty's allegation is that counsel did not investigate his case prior to trial as she has a duty to do. *Strickland*, 104 S.Ct. at 2066. If she had, and if the purse and the "confession" could have been kept out of evidence, then the prosecutor's most devastating counter-argument to Petty's identification defense would have been silenced. What is more, investigation would have been simple. The name of a disinterested witness appeared on the consent to search form itself. (SF 298). He was a witness to the arrest, the consent and possibly to the search itself. Since the record does not negate Petty's allegation of a lack of investigation, then judgment on the record was inappropriate.

An additional fact question was raised by Petty's inartfully pleaded claim that his counsel did not advise him regarding the case. A particular example from the record that supports this claim regards his own testimony during the sentencing phase. Petty's counsel called him to the stand principally to explain to the jury why he was missing certain teeth. (SF 251, 252). Identification may have been an important issue during the case in chief, but because of the jury's verdict of guilty, the explanation for his missing teeth came too late. Hence, Petty was placed on the stand for no useful purpose.

The effect of the cross-examination of Petty was undeniably damaging. He made several damaging admissions that were nonresponsive to the prosecutor's questions and which reflected that his trial counsel had failed to advise or prepare him in any way for cross-examination. (SF 255-261).

In response to a question about whether scaring people was his idea of fun, Petty admitted he had "been to a party and we had been drinking and smoking." (SF 225). In response to a question about whether violation of the law was a violation of the terms off his probation, Petty said "you've got to get caught first." (SF 256). The prosecutor passed the witness after a brief cross-examination, and Petty's counsel, instead of resting, asked if Petty had a drug problem—an issue she had not raised, nor had it been mentioned in the case up to that time. (SF 257). The effect of her question was not only to introduce another reason for the jurors to dislike Petty, but to allow the prosecutor to continue with an even more devastating cross-examination. (SF 258-261).

Petty claimed he received no advice regarding the trial. A review of the cross-examination of Petty during sentencing does not negate his sworn allegation. Hence, judgment on the record was inappropriate.

II. SINCE THE DISMISSAL OF PETTY'S CLAIM WAS DUE TO A PLEADING INSUFFICIENCY, PETTY SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO AMEND OR SHOW REASON WHY HIS COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

Petty contends that his ineffectiveness assistance allegation was dismissed due to a pleading insufficiency and that, therefore, the district court should never have reached the merits of his case. Therefore, Petty contends that a decision regarding his ineffective assistance claim was improperly included in the district court's dismissal and denial of Petty's five other habeas claims. Instead of dismissal and denial, the district court should have taken any of a number of less drastic measures regarding Petty's claim.

A. Petty Should Have Been Notified Pursuant To Rule 2(e) Of The Reasons His Petition Was Insufficient.

One proper disposition of Petty's ineffective assistance claim would have been to return the petition to Petty pursuant to Rule 2(e) of the Section 2254 Rules.

Upon first glance, Petty's ineffective assistance pleading appears to be properly pleaded. Statements were made by Petty that appear to be facts, as viewed from his perspective. From another perspective, as the state, the magistrate and the district court concluded, Petty's allegations are merely conclusory. Without a pleading of prejudice, Petty's factual assertions may be considered "conclusory," when viewed from the perspective of *Strickland* and *Hill*. This is how the Fifth Circuit viewed the district court's dismissal. (AF-2).

On the other hand, Rule 2(e) does not merely refer to gross errors in pleading, such as the failure to utilize the Form, but refers to any Rule 2(c) insufficiency. As the state points out, Rule 2(c) requires that some degree of factual content be pleaded by habeas petitioners. In particular, Rule 2(c) states that the petition "shall set forth in summary form the facts supporting each of the grounds thus specified." If a petition is not in compliance with Rule 2(c), then Rule 2(e) requires the petition to be returned to the petitioner "*with a statement of the reason for its return.*"

Rule 4, 28 U.S.C. fol. 2254, requires that "the original petition be presented promptly to a judge" and that "the petition shall be examined promptly by the judge to whom it is assigned." Rule 4 then calls for the judge to either order summary dismissal of the petition "and cause the petitioner to be notified" or "order the respondent to file an answer or other pleading." Summary dismissal does not reach the merits. *Sanders* v. *United States*, 373

U.S. 1, 19 (1963). Where the record does not conclusively show that a habeas petitioner is entitled to no relief, then the "better course" is to "direct petitioner to amend his motion." *Id.* at 19.

On the same day, March 7, 1984, that Petty's petition was filed, it was presented to the magistrate who ordered that the state file its answer. Presumedly, the magistrate examined Petty's petition for purposes of compliance with Rule 2(c) and presumedly Petty's petition passed muster upon initial examination. In fact, five of Petty's six allegations were properly pleaded under Rule 2(c).

Yet, both the state's answer and the magistrate's Report and Recommendation concluded that Petty's pleadings were insufficient and eventually, by adopting the magistrate's findings, so did the district court. However, Petty was never specifically instructed as to such a finding under either Rule 2(e) or Rule 4.

There is nothing in the Rules Governing Section 2254 Proceedings that withdraws the application of Rule 2(e) once an answer has been required from the state. Rule 8, 28 U.S.C. fol. 2254, provides that even if the judge determines that an evidentiary hearing is not required, then "the judge shall make such disposition of the petition as justice shall require." He does not become limited in his discretion simply because he has previously ordered the state to file an answer. Rule 2(e) should be applied at any time a pleading insufficiency is found and so should have been utilized by the district court below.

B. In The Alternative, The District Court Should Have Ordered The Expansion Of The Record.

Rule 7, 28 U.S.C. fol. 2254 provides for the expansion of the record by order of the district court. The Advisory Committee Note to Rule 7 encourages district courts to utilize this step to expand the factual record in situations

where the existing record and the factual pleadings are insufficient to make a proper determination as to whether to hold an evidentiary hearing. Petty's case presented a tailor-made "expansion of the record" case to the district court.

Rule 7 authorizes the use of written interrogatories propounded by the judge to the parties. Interrogatories to Petty or his trial counsel directed to pretrial investigation and advice given to Petty may have garnered the factual information missing from the record and Petty's petition. Based upon the answers made to judicial interrogatories, the district court may then have properly reached the merits.

C. In the Alternative, Petty Should Have Been Afforded An Opportunity To Show Reasons Why His Petition Should Not Be Dismissed.

Respondent attempts to equate the 10-day objection period within which the parties were to object to the magistrate's proposed findings with an opportunity for Petty to amend or show reasons why his petition should not be dismissed. This is inappropriate with a *pro se* petitioner. As the Advisory Committee Note to Rule 2(c) reflects, the adoption of the form used by Petty to file his petition was at least in part directed for the benefit of the petitioner. It was recognized that *pro se* petitioners are not well-versed in the interpretation of general pleading guidelines. For the same reason, Petty should not be expected to interpret the general 10-day objection period to indicate that he must replead his effectiveness of counsel allegations.

After determining that Petty's pleading was insufficient, the magistrate proceeded to review the record to determine, albeit incorrectly, that Petty had received effective assistance. Petty was therefore led to believe that the requirement of factual pleading was not critical to

consideration of his case. As in *Clark* v. *Blackburn*, the magistrate's review of only limited aspects of the record "is not dispositive of the serious allegations concerning pretrial preparation in the petition." *Clark*, 619 F.2d at 434. If there was a message to Petty within the magistrate's Report and Recommendation that he should replead, it was understandably lost on Petty as a *pro se* petitioner.

Even as a *pro se* petitioner, Petty knew he had been prejudiced by the omissions of his trial attorney and he attempted to identify those acts and omissions as best he could. Petty was given 10 days to respond to somewhat confusing findings made by the magistrate on not only his ineffectiveness of counsel allegations, but each of the five other allegations as well. It is not surprising to find no response to such a general directive from a *pro se* petitioner.

To remedy this dilemma, district courts are authorized under Rule 4 "to take such other action as the judge deems appropriate" and under Rule 8 to dispose of a petition "as justice shall require." This does not foreclose returning the petition pursuant to Rule 2(e) even after the answer was filed and the record had been reviewed.

Additionally, the Advisory Committee Note to Rule 4 suggests other alternatives to dismissal, including authorizing the respondent to file a motion to make the petition more certain. Even after the state's answer was filed, this option remained open.

Finally, one purpose of Rule 4 is to provide for summary dismissal of petitions when it "plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." Such a ruling would not have been made on the merits. *Sanders*, 373 U.S. at 19. If Petty's ineffective assistance claim had been summarily dismissed, then Petty would have been able to replead without facing a

defense that his prior petition had been considered on the merits.

III. THE FIFTH CIRCUIT PROPERLY EXERCISED ITS DISCRETION IN REMANDING PETTY'S CASE FOR AMENDMENT.

In the first paragraph of its opinion, the Fifth Circuit recognized that it could not, on the merits, consider the many facts that suggest possible prejudice which were presented by Petty for the first time on appeal. (AF-2). Though the Fifth Circuit discussed and commented upon Petty's allegation of prejudice stemming from his counsel's failure to investigate his possible insanity defense, those discussions played no necessary part in the Fifth Circuit's decision to remand.

The Fifth Circuit was faced with a situation in which a district court had dismissed a habeas petition due to a *Hill*—type defect in pleading. On its face, the district court's dismissal appeared to have been made on the merits. The Fifth Circuit's own review of the record, including Petty's new allegation of prejudice made for the first time on appeal, did not reveal that it was "beyond doubt" that Petty was entitled to no relief. Judgment on the merits was thus inappropriate.

The district court had bypassed every procedure which might have focused Petty's attention on his pleading defects. The Fifth Circuit was called upon to consider whether or not Petty's allegations were such that they could not possibly have been supported by a showing of prejudice. Importantly, the Fifth Circuit was considering an extreme situation in which Petty had been incarcerated since 1979 and had had his federal habeas petition on file since March 7, 1984.

The rule that appellate courts normally do not consider new facts on appeal was not ignored by the Fifth Circuit.

Indeed, the opinion referred to that general rule. (SF-2). However, the general rule is discretionary in nature. *See*, Annot., 76 A.L.R. Fed. 522, 524-26 (1986). More importantly, the rule is better fitted to a situation wherein the party presenting new facts on appeal has been represented throughout by counsel.

Where the writ of habeas corpus is involved, circuit courts can be expected to vary from this general rule, especially where *pro se* petitioners are before them. In *Harris*, 394 U.S. at 291, this Court stated:

> The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

It was in the interests of justice and to flexibly administer the writ that the Fifth Circuit examined Petty's new claim of prejudice.

The State's argument that the Fifth Circuit's ruling serves to perpetuate this matter in court is also amiss. The effect of the ruling is to at last focus Petty, a *pro se* petitioner, upon the *Strickland* and *Hill* prejudice requirement so that he can replead and the district court can quickly reach the merits. Indeed, the Fifth Circuit's entire discussion of Petty's new prejudice claim is couched in terms of "efficiency" and "finality." (AF-5).

An example of how consideration of new evidence presented upon appeal promotes finality was *Norman* v. *McCotter*, 765 F.2d 504 (5th Cir. 1985). Therein, the *pro se* petitioner had failed to allege sufficient facts in his petition, but on appeal had filed an affidavit presenting new facts. The Fifth Circuit considered the affidavit, noting

that it did so "only because he is a pro se petitioner and only because he reasonably claims he would have submitted it to the district court had he been notified that the State's motion was going to be treated as a motion for summary judgment." *Id.* at 508, n.3. By reviewing the affidavit, the Fifth Circuit was able to fully consider the grant of summary judgment and affirm the district court's decision.

Finally, that the Fifth Circuit considered Petty's claim of prejudice is understandable considering the procedural background of this case. Neither *Strickland* nor *Hill* had been decided when Petty filed his petition. Petty filed his petition in accordance with the instructions on the Form provided to him by the district court. His petition was not returned at any point as insufficient even though the state, the magistrate and the district court each found it to be insufficient. Instead, the district court dismissed Petty's petition failing to utilize any of a number of procedures to expand the factual record, investigate Petty's allegations or bring the deficiencies to his attention.

The Fifth Circuit's decision does not undermine finality, nor improperly deny the state its defense of abuse of the writ. The district court's dismissal improperly reached the merits of Petty's action. The Fifth Circuit's decision recognized as much and made a correction, promoting the interests of justice and flexibily administering the writ of habeas corpus.

CONCLUSION

For the reasons stated above, Gregory Allen Petty prays that the decision of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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